Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

JAMES D. MYERS,

Petitioner,

v.

HALLIBURTON COMPANY and
BROWN & ROOT ENERGY SERVICES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Federal Arbitration Act, Texas may force an employee at will into arbitration based on four company documents containing a plan of dispute resolution that he received in the mail but was not asked to sign or review with a lawyer and that he accepted simply by reporting for work.

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Myers Aff.	–	Affidavit of J. D. Myers. *See* Exhibit ("Ex.") attached to Plaintiff's Opposition to Defendant's Motion to Compel Arbitration.
Orig. Pet.	–	Plaintiff's Original Petition.
Program	–	Dispute Resolution Program.
Plan	–	Halliburton Dispute Resolution Plan. *See* Defendants' Motion to Compel Arbitration to Dismiss or Stay Proceedings in this Court Pending Such Arbitration, Ex. C, Attachment ("Att.") 4.
Handbook	–	Halliburton Dispute Resolution handbook. *See* Defendants' Motion, Ex. C, Att. 6.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

J. D. Myers petitions for a writ of certiorari to review the judgment of the Texas Supreme Court in this case.

OPINION BELOW

The opinion of the Texas Supreme Court is reported at 80 S.W.3d 566 and is reprinted in the appendix.

STATEMENT OF JURISDICTION

This case arises under the Federal Arbitration Act (FAA), 9 U.S.C. § 2 (1999), and the motion of the respondents, Halliburton Company and Brown & Root Energy Services, Inc., to compel arbitration pursuant to that Act. J. D. Myers (Myers) opposed the motion to compel on the ground that no arbitration contract was ever formed. The Texas Supreme Court issued an order on May 30, 2002, requiring arbitration. *See* Appendix A, *In re Halliburton*, 80 S.W.3d 566 (2002). The Texas Court denied rehearing on August 22, 2002. *See* Appendix C.

This Court has jurisdiction under 28 U.S.C. § 1257 (2002). The Court has the power over state judgments to correct them to the extent that they incorrectly adjudge federal rights. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Here, the respondents invoked the FAA by their motion to compel arbitration pursuant to that federal statute. The Texas Court incorrectly adjudged federal rights under the FAA, and thus this Court has the power to correct that judgment.

FEDERAL ARBITRATION ACT

9 U.S.C. § 2 (1999):

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction,

> or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This is a petition to review an order of the Supreme Court of Texas issuing a writ of mandamus to order arbitration under the FAA.

1. Halliburton's Dispute Resolution Program.

In November 1997, Halliburton, parent company of Brown & Root, mailed out materials to its employees announcing its new "Dispute Resolution Program," which was to take effect on January 1, 1998. The materials consisted of:

- a 3-inch by 8-inch trifold summary folder of the "Four-Option Plan,"
- an 8 ½-inch by 11-inch glossy handbook describing the Program,
- a 4-inch by 9-inch, 19-page, single-spaced, small-type booklet entitled the "Dispute Resolution Plan and Rules," and
- a one-page letter of summary.

2. The Handbook.

In the Handbook, Halliburton represented that "[the program's] purpose is to give you an improved process and flexible options for airing and settling almost every kind of workplace dispute." Handbook 1. The Handbook said that Halliburton had created the Program by "listening" to employees' complaints. *Id.* at 4.

Halliburton represented that the Program contained options. "The approach, packaged as a four-option plan, is called the Halliburton Dispute Resolution Program." Handbook 6. Arbitration was "Option 4," the other options being the Open Door Policy, the Conference, and Mediation. *Id.* at 1, 3, 14. The Handbook explained,

> If the dispute involves a legally protected right . . . and has not been resolved in Options One, Two or Three, you or the Company may request arbitration. While you do not have to proceed through each of the options in their exact numerical order, the Program is designed with multiple options to maximize the possibility of resolution prior to Option 4.

Id. at 14. Halliburton stated that it would "ask" a court to dismiss a lawsuit if one were filed. *Id.* at 19.

The Handbook stated, "Lawsuits are adversarial and destructive in nature to all parties. In addition, lawsuits typically take years to run their course and often generate unwanted publicity, embarrassing all parties." *Id.* at 18. Halliburton said that disputes could be resolved in a matter of "weeks" under the Program. *Id.* at 4. Halliburton stated, "[Arbitration] prevent[s] excessive spending on lawyers' fees." *Id.* at 6.

The Handbook provided that "Halliburton will pay the major part of your legal fees through the Legal Consultation Plan, up to a maximum of $2,500." *Id.* at 15. This amount was represented to be "90%" of the employee's legal fees. *Id.* at 2. Halliburton told the employees, "Of course, if you choose to hire and pay for your own attorney, you are free to do so at any time." *Id.* at 10. Halliburton offered to forego having lawyers in arbitration. "If you choose not to bring a lawyer to arbitration, the Company will also participate without a lawyer." *Id.* at 15.

3. The Arbitration Plan.

The actual arbitration agreement was the 4-inch by 9-inch booklet which contained the detailed rules by which arbitration would be conducted. The first sentence is 94 words long. Plan 1. Toward the bottom of the first paragraph the booklet stated, "The Plan contractually modifies the 'at-will' employment relationship between the Company and its employees, but only to the extent as expressly stated in this Plan." *Id.*

Section 6 of the booklet granted Halliburton the right to amend the Plan at any time. *Id.* at 5. However, no amendment could be made regarding a dispute of which Halliburton had already received actual notice, such as an intent to arbitrate. *Id.* Similarly, under Section 7 Halliburton could cancel the Plan at any time on 10 days' notice, except for an actual dispute in progress. *Id.*

Myers received the Halliburton documents in the mail and looked through them. He did not study them or consult a lawyer. He went to work the next day as usual. Myers Aff. 2.

4. Myers's Employment History.

Myers, a white man aged 54, had worked as a welder for Brown & Root Services, Inc., for more than 32 years. *See* Appendix D, Affidavit of J. D. Myers 1 (Myers Aff.) He had a high school diploma. Myers had started as a welder, and through the years Brown & Root had promoted him to lead welder, welding foreman, and finally general welding foreman. *Id.* Before 1998, Myers had a good work record, no reprimands, no written counseling, and no poor evaluations of any kind. *See* Plaintiff's Original Petition which is being submitted as a Lodging. ("Orig. Pet.") 2.

Myers alleged that Joe Montalvo, a Hispanic foreman who favored Hispanic workers, became his supervisor. Orig. Pet. at 3. Montalvo gave the Hispanic welders better job assignments than the non-Hispanics. He communicated with Hispanics in Spanish. When Myers asked what was said, they would laugh. *Id.*

Montalvo placed the better welders with Hispanic foremen and left the less qualified welders in Myers's group. Montalvo made all promotion decisions regarding welders whom Myers supervised without seeking any input from Myers. Montalvo encouraged the welders to come directly to him if they had a problem. If a Hispanic subordinate disagreed with Myers's instruction, the employee would bypass Myers and go to Montalvo. Myers reported these acts to upper management, but they approved Montalvo's decisions. *Id.*

There were also complaints about Myers's age. Orig. Pet. at 4, 9-10. Montalvo's boss, Pat Morton, asked Myers, "My God, J. D., how old are you anyway?" *Id.* at 4. Morton also

stated that he did not think Myers could cope with any reorganization due to his "age and mobility." Both Montalvo and Morton asked Myers when he planned to "retire" and said that he had been there "too long." *Id.*

In October 1998, Brown & Root demoted Myers to welding foreman. His replacement was a younger Hispanic worker who had been employed by the company for three weeks. Orig. Pet. at 4. Morton told Myers that his demotion was because of "lack of interpersonal skills." Morton refused to explain further. *Id.*

5. Procedural History.

On October 21, 1998, Myers filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and the Texas Commission on Human Rights Act (TCHRA). Orig. Pet. at 4. After receiving the agencies' Notice of Right to Sue, Myers filed suit in Texas state court on October 4, 1999. Halliburton invoked the authority of the FAA by a motion to compel arbitration pursuant to the terms of that statute. Myers opposed the motion on the ground that there was no contract to arbitrate.

The trial court denied arbitration. Halliburton sought a writ of mandamus from the First Court of Appeals in Houston based on the FAA. The Court of Appeals unanimously denied mandamus on the ground that Halliburton's promise to arbitrate was illusory. *See* Appendix B, Opinion of the First Court of Appeals. The Court of Appeals concluded, "Brown & Root's petition does not demonstrate that the agreement to arbitrate was supported by valid consideration in the form of non-illusory promises." *See* Appendix B at 2.

The Texas Supreme Court overruled both lower courts and granted Halliburton a writ of mandamus. *See* Appendix A. One judge concurred in the judgment only.

REASONS FOR GRANTING THE WRIT

I. The Texas Decision In This Case Invites Employers To Expand The Federal Arbitration Act And Create Contracts Of Arbitration By Mailing Documents To Employees Without Any Of The Traditional Protections Of Contract Law.

A. Halliburton's mailing should not create a contract to arbitrate because this Court has consistently required an affirmative agreement to arbitrate under the Act.

This Court must decide whether employers throughout the United States can take advantage of the Federal Arbitration Act to form arbitration contracts by bulk mailings to at-will employees. If this decision stands, states will be free to allow employers to fasten arbitration agreements on unsuspecting workers who bind themselves to a glossy folder and a printed booklet.

Congress's purpose in enacting the FAA was to place arbitration agreements on the same footing as other contracts. The statute does not elevate arbitration agreements to a protected status. Hence, "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute," i.e., to decide whether a valid contract was created. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

In this case, the Texas Supreme Court held that the booklet mailed to Myers, an at-will employee, created a contract to arbitrate under the FAA — even though Myers never communicated with Halliburton about the booklet, was not warned to take the booklet to a lawyer, and did not realize that he was entering into a contract.

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), a case similar to this one, the Kaplans denied that their disagreement with First Options was arbitrable. A unanimous Court discussed contract law at length and held that "arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration." *Id.* at 943. The underlying issue of arbitrability, whether a party has agreed to arbitrate the dispute, is a question of substantive federal law. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984).

More recently, in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Court again relied on contract law to determine that the EEOC could not be forced to arbitrate its claims. The Court stated, "The FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.' " *Id.* at 293.

Thus, Texas should not force Myers to arbitrate his demotion by Halliburton because he never agreed to submit his dispute to arbitration. The Texas holding that "notice" in the form of a mass mailing created an arbitration contract ignores the federal Act. 80 S.W.3d at 572.

B. The documents Halliburton mailed to Myers do not create an arbitration contract under the Act because they lack the elements of a bargain.

This Court has held repeatedly that the parties strike a "bargain" when they form an arbitration contract. Courts are required to enforce the "bargain of the parties to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985). "Having made the bargain to arbitrate, the party should be held to it." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Mitsubishi, supra*, 473 U.S. at 628. "We require this representative of the American business community to honor its bargain." *Id.* at 640. Myers never made a bargain with Halliburton: he just opened another piece of junk mail.

In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), Justice Souter expressed in his dissenting opinion the concern "that arbitration could prove expensive or unfavorable to employees, many of whom lack the bargaining power to resist an arbitration clause if their prospective employers insist on one." *Id.* at 138-39. In this case, arbitration will prove unfavorable to Myers because it deprives him of complete discovery and a jury. But Halliburton did not insist on arbitration or ask for Myers's signature. Halliburton just sneaked it by him.

The word "bargain" is important because it is an element in the definition of consideration.

> Consideration is a bargained for exchange of promises. Consideration consists of benefits and detriments to the contracting parties. The detriments must induce the parties to make the promises, and

> the promises must induce the parties to incur the detriments. A contract that lacks consideration, lacks mutuality of obligation, and is unenforceable.

Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492, 496 (Tex. 1991). The Restatement (Second) of Contracts § 17 (1981) (Restatement) provides that "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), the plaintiffs were consumers who had signed contracts that allowed the sellers to repossess the goods without due process. The Court addressed whether the consumers had voluntarily waived their constitutional right to due process by signing the contracts, and the Court held that they had not.

> There was no bargaining over contractual terms for the parties who, in any event, were far from equal in bargaining power. The purported waiver provision was in a printed part of a form sales contract and a necessary condition of the sale. The appellees made no showing whatsoever that the appellants were actually made aware of the significance of the fine print now relied upon as a waiver of constitutional rights. . . . [A] waiver of constitutional rights in any context must, at the very least, be clear.

Id. at 95.

An exchange of promises must take place to form a valid arbitration contract. This is in line with prior cases brought before the Court where the parties had negotiated or bargained for an agreement which contained an arbitration clause. *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

In the present case, there was no communication outside the mailings between Myers and Halliburton. There was no indication whatever from Myers that he agreed to and accepted a contract. The company never talked to him about the Plan — although he was at work every day — and never asked him to agree to it. There was no "bargain." The Texas Supreme Court ignored this requirement of the Federal Arbitration Act.

As a result, the Texas Court opened a massive loophole for employers in the statute. Companies throughout the United States will follow this example and form contracts of adhesion with workers who have no idea of what is happening to them. This decision will swallow entirely the contract requirement of the federal Act.

II. The Texas Decision Conflicts With Decisions Under The Act By Other State Supreme Courts And Federal Courts Of Appeals That Reject Arbitration Agreements Because There Was No Explicit And Unequivocal Agreement.

A. Federal Courts reject agreements to arbitrate that grant broad powers to amend or lack express agreement.

A majority of the federal courts of appeals have rejected requests to compel arbitration under the FAA where no arbitration contract was created. In *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753 (7th Cir. 2001), the plaintiff signed an employment agreement at hiring. The agreement was actually between Penn and Employment Services, Inc. (EDS), a company engaged by Ryan's to provide arbitration services. The court held that EDS's promises were illusory because the contract gave EDS the sole, unilateral discretion to modify or amend the agreement. The court added, "The fact that EDS and Ryan's may cancel their agreement with ten days' notice also does nothing to inspire our confidence that EDS is incurring any real detriment here." *Id.* at 760. The court held that no enforceable arbitration contract was ever created.

The Third Circuit Court of Appeals also applied contract law to determine that no express arbitration contract existed under the FAA. *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51 (3d Cir. 1980). Par-Knit had made an oral contract to purchase fabric from Stockbridge. The written confirmation sent to Par-Knit, signed by Par-Knit's production manager, contained an arbitration clause, which the parties had not discussed. The district court ordered the

parties to arbitration based on New York law. The Court of Appeals reversed the judgment. "Before a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect." *Id.* at 54. The court remanded the case for a jury determination under Section 4 of the FAA of whether a valid arbitration contract was ever formed.

In *Fleetwood Enterprises, Inc. v. Gaskamp*, 280 F.3d 1069 (5th Cir. 2002), the plaintiffs filed suit in Mississippi state court on behalf of themselves as well as their children, claiming that all had been injured by formaldehyde in their new mobile home. The defendant filed a complaint to compel arbitration in the United States District Court, and that court held that the children were subject to the arbitration contract that their parents had signed. The Fifth Circuit Court of Appeals reversed. "In adjudicating a motion to compel arbitration under the Federal Arbitration Act, courts begin by determining whether the parties agreed to arbitrate the dispute. . . . This determination is generally made on the basis of 'ordinary state-law principles that govern the formation of contracts.' " After surveying Texas contract law, the Circuit Court held that the children were not required to arbitrate their personal injury claims. The Court also commented that the "federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties." *Id.* at 1073.

Other federal courts adjudicating rights under the FAA have rejected arbitration because no contract was ever formed. *See Ramirez-de-Arellano v. American Airlines, Inc.*, 133 F.3d 89, 90 (1st Cir. 1997) (Employee handbook not the equivalent of a binding arbitration agreement. "The threshold question for review must always be whether the agreement

to arbitrate was 'voluntary and intentional.' "); *McCarthy v. Azure*, 22 F.3d 351, 356 (1st Cir. 1994) (There must be some "overt indication" to show that the parties intend to commit their claims to an arbitral forum.); *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd.*, 241 F.3d 135 (2d Cir. 2001) (The initial determination as to compelling arbitration under the FAA must be whether there was a "meeting of the minds sufficient to constitute a contract."); *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153, 1155 (9th Cir. 1998) (Employee handbook was not an agreement to arbitrate under the FAA because it was not "explicitly presented to the employee," nor did the employee "explicitly accept the terms."); *Nelson v. Cyprus Bagdad Copper Corp.*, 119 F.3d 756, 762 (9th Cir. 1997), *cert. denied*, 523 U.S. 1072 (1998); (The unilateral promulgation by an employer of arbitration provisions in an employee handbook does not constitute a "knowing agreement" required for a contract under the FAA.); *Avedon Engineering, Inc. v. Seatex*, 126 F.3d 1279 (10th Cir. 1997) (The existence of an agreement to arbitrate is a threshold matter which must be established before the FAA can be invoked.); *Hull v. Norcom, Inc.*, 750 F.2d 1547 (11th Cir. 1985) (Employee handbook was not an arbitration agreement because it was not supported by consideration.); *Bailey v. Fed. Nat. Mortgage Asso.*, 209 F.3d 740 (D.C. Cir. 2000) (Employee handbook unilaterally issued was not an arbitration agreement because there was no meeting of the minds.).

B. State supreme courts have rejected arbitration agreements based on manuals that lack express agreement.

Other states have refused to compel arbitration when the alleged agreement did not satisfy ordinary requisites of contract formation. All of these cases involved a motion to compel arbitration under the FAA, which the courts rejected because no valid contract had been formed. *See In re Waldron & Goddess*, 61 N.Y.2d 181, 461 N.E.2d 273, 473 N.Y.S.2d 136 (N.Y. 1984) (Mere continuation of employment does not operate to extend employment contract that has expired. A party will not be compelled to arbitrate and thereby to surrender the right to resort to the courts without evidence that the parties "expressly agreed" to arbitrate.); *Southern Energy Homes, Inc. v. Hennis*, 776 So. 2d 105 (Ala. 2000) (A homeowner's manual containing an arbitration provision does not satisfy the "requisite elements" of an offer and an acceptance, consideration, and mutual assent to terms essential to the formation of a contract.); *Victoria v. Kaiser Foundation Hosp.*, 40 Cal. 3d 734, 710 P.2d 833 (Cal. 1985) (There is no policy compelling persons to accept arbitration of controversies which they have not agreed to arbitrate.); *Curtis G. Testerman Co. v. Buck*, 340 Md. 569, 579, 667 A.2d 649, 654 (Md. 1995) (No one is under a duty to resort to arbitral tribunals, however helpful their processes, except to the extent that he has "signified his willingness."); *Obstetrics & Gynecologists v. Pepper*, 101 Nev. 105, 693 P.2d 1259 (Nev. 1985) (A party cannot be compelled to arbitrate a dispute if no "meeting of the minds" occurs.).

The opinion of the Texas Supreme Court ignores all these authorities. This is an urgent problem of federal law. There is no check on the power of the employer to create unfair contracts under this decision. Opening an envelope is not bargaining.

If arbitration helps the worker, surely he can place his signature on the document to give assent. Given the growing trend to submit disputes to arbitration, this Court must decide whether a lower court can require arbitration of a dispute based on nothing but a mailing. The Court should grant certiorari to decide whether Halliburton's actions in this case created a contract enforceable under the Federal Arbitration Act.

CONCLUSION

The Court should grant certiorari to decide whether the Supreme Court of Texas in this case complied with federal law.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF TEXAS DATED MAY 30, 2002

Supreme Court of Texas.

No. 00-1206.

In re HALLIBURTON COMPANY
and Brown & Root Energy Services, Relators.

Argued Nov. 7, 2001.

Decided May 30, 2002.

Chief Justice PHILLIPS delivered the opinion of the Court in which Justice HECHT, Justice ENOCH, Justice OWEN, Justice HANKINSON, Justice O'NEILL, Justice JEFFERSON, and Justice RODRIGUEZ joined.

We are once again asked to decide whether mandamus should issue to enforce an arbitration provision, in this instance between an employer and an at-will employee. The employer sent notice of a new dispute resolution program (the Program) to the employee informing him that continuing employment would constitute acceptance of the new plan. When the employee was later demoted, he filed suit rather than following the Program. The district court denied the employer's motion to compel arbitration under the Federal Arbitration Act and stay or dismiss the trial court proceedings. The court of appeals also denied relief. 80 S.W.3d 611. We conclude that the Program meets the requirements for altering an at-will employment contract, is not unconscionable, and is otherwise enforceable under general contract principles. Because the employer has no adequate remedy on appeal, we conditionally grant the writ.

Appendix A

I

James D. Myers has been an at-will employee of Brown & Root Energy Services, now a subsidiary of Halliburton Company, for approximately thirty years. In November 1997, Halliburton sent notice to all employees of Halliburton companies that it was adopting a Dispute Resolution Program.[1] As part of that program, binding arbitration was designated as the exclusive method for resolving all disputes between the company and its employees. The notice informed employees that by continuing to work after January 1, 1998, they would be accepting the new program.[2]

Myers does not dispute that he received this notice, but he claims that he did not fully understand it. Nevertheless, he continued working for Halliburton after January 1, 1998. Sometime in 1998, Halliburton demoted him from his position as a General Welding Foreman. Although he was

1. Brown & Root apparently adopted the same program in 1993. The parties provided this Court with a cover letter for materials sent to Brown & Root employees in 1993. However, the materials were not provided to us. Even if Myers' at-will employment contract was modified when Brown & Root adopted the program in 1993, it was further modified in 1998 when Halliburton adopted the program for all of its employees.

2. In its motion to compel arbitration, Halliburton also argued that Myers had agreed to arbitration by signing a document entitled "Assignment Authority Supplement," which contained a statement acknowledging the new Dispute Resolution Program and agreeing to submit to binding arbitration. When Myers asserted that the signature on the document was not his, Halliburton abandoned this argument.

told this demotion was due to "a lack of interpersonal skills," Myers alleges that the real reason was discrimination based on his race and age. In October 1999, Myers brought this suit in district court alleging wrongful demotion in violation of the Texas Commission on Human Rights Act, TEX. LAB. CODE § 21.001. Halliburton asked the trial court to compel arbitration under the Program and to either stay or dismiss the lawsuit. The trial court denied the motion, and the court of appeals denied Halliburton's petition for writ of mandamus.

II

Under the Federal Arbitration Act (FAA), an agreement to arbitrate that is valid under general principles of state contract law and involves interstate commerce is "valid, irrevocable, and enforceable." 9 U.S.C. § 2. The parties here do not dispute that the contract involves interstate commerce. We must determine whether, under state law, the Program's arbitration clause is valid. 9 U.S.C. § 2.

In *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227 (Tex.1986), we outlined the manner in which an employer may change the terms of an at-will employment contract. We held that the party asserting a change to an at-will employment contract must prove two things: (1) notice of the change, and (2) acceptance of the change. *Id.* at 229. We stated that "to prove notice, an employer asserting a modification must prove that he unequivocally notified the employee of definite changes in employment terms." *Id.* Yet we made clear that when an employer notifies an employee of changes to the at-will employment contract and

the employee "continues working with knowledge of the changes, he has accepted the changes as a matter of law." *Id.* (citation omitted).

Here, it is undisputed that Halliburton notified Myers of the proposed changes. The notice explained the Program, stated its effective date, and explained that by working after that date an employee would indicate that he or she accepted the provision. Myers argues that he only briefly looked at the documents and that he did not understand them. The materials, however, unequivocally notified him that his employment terms would be changing. A one-page summary included in the materials stated:

> While both you and Halliburton retain all substantive legal rights and remedies under this Program, you and Halliburton are both waiving all rights which either may have with regard to trial by jury for employment related matters in state or federal court.

The accompanying materials set forth that adopting the new Program meant that

> if you accept or continue your employment after January 1, 1998, you will agree to resolve all legal claims against Halliburton through this process instead of through the court system.

After receiving this notice, Myers continued to work for Halliburton after January 1, 1998, thus accepting the changes as a matter of law.

This is not a case in which the written notice was contradicted by other written or oral communications between the employer and the employee. *See Hathaway*, 711 S.W.2d at 229. On this record we conclude that Halliburton's offer was unequivocal and that Myers' conduct was an acceptance of that offer.

The court of appeals held that Halliburton's promises were illusory, and therefore could not constitute consideration for Myers' promise to arbitrate. 80 S.W.3d 611. The court relied on *Light v. Centel Cellular Co.*, 883 S.W.2d 642 (Tex.1994), for the proposition that

> because an at-will employer and employee may not contract to limit the ability of either to terminate the employment at-will, a promise by either which is dependent on a period of continued employment is illusory and thus insufficient to support a bilateral contract because it would fail to bind the promisor who always retains the option of discontinuing employment in lieu of performance.

Id. at 645.

This is a correct statement of the law, but it does not apply to the situation here. In *Light*, we considered the validity of a covenant not to compete between an at-will employee and her employer. *Light*, 883 S.W.2d at 643. We held that certain promises made by the employer in the covenant were illusory because they were dependent on the at-will employee's continued employment. *Id.* at 645-46.

Appendix A

The employer could avoid performance simply by terminating the employment relationship, while the employee was bound whether she stayed or left. *Id.* at 645.

By contrast, the Program is not *dependent* on continuing employment. Instead, it was *accepted* by the employee's continuing employment. When Myers reported for work after January 1, 1998, he accepted Halliburton's offer; both Myers and Halliburton became bound to arbitrate any disputes between them. Even if Myers' employment had ended shortly thereafter, the promise to arbitrate would have been binding and enforceable on both parties. In *Light*, the employer was bound only while the employee continued to work. Thus, following Myers' acceptance, the Program was not dependent on continuing employment and was not illusory. *See also In re Jebbia*, 26 S.W.3d 753, 758 (Tex.App.-Houston [14th Dist.] 2000, orig. proceeding) (rejecting the argument that an arbitration provision lacked consideration because the employment relationship was at-will).

Myers also asserts that Halliburton's promises were illusory because the company retained the right to modify or discontinue the Program. But the Program also provided that "no amendment shall apply to a Dispute of which the Sponsor [Halliburton] had actual notice on the date of amendment." As to termination, the plan stated that "termination shall not be effective until 10 days after reasonable notice of termination is given to Employees or as to Disputes which arose prior to the date of termination." Therefore, Halliburton cannot avoid its promise to arbitrate by amending the provision or terminating it altogether. Accordingly, the provision is not illusory.

Myers further asserts that because his statutory rights under the Texas Commission on Human Rights Act are implicated, a higher standard applies in determining if he agreed to binding arbitration. For this proposition, he cites *Prudential Insurance Co. v. Lai*, 42 F.3d 1299 (9th Cir.1994). *Lai* held that the employer must establish at least a "knowing agreement to arbitrate employment disputes" before an employee may be deemed to have waived a judicial determination of his or her rights under Title VII and related state statutes. *Lai*, 42 F.3d at 1304. The court held that because the arbitration agreement did not specifically mention the type of claim the plaintiffs alleged, the plaintiffs could not have "knowingly" agreed to arbitrate those claims. *Id.* at 1305. However, nearly every subsequent decision has rejected Lai's "knowing waiver" standard. *See, e.g., Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 761 (7th Cir.2001); *Haskins v. Prudential Ins. Co. of Am.*, 230 F.3d 231, 239-40 (6th Cir.2000); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 n. 2 (3rd Cir.1998); *Battle v. Prudential Ins. Co. of Am.*, 973 F.Supp. 861, 866 (D.Minn.1997); *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F.Supp. 1460, 1474-75 (N.D.Ill.1997); *Maye v. Smith Barney, Inc.*, 897 F.Supp. 100, 107 (S.D.N.Y.1995); *Bryant v. American Exp. Fin. Advisors, Inc.*, 595 N.W.2d 482, 486 (Iowa 1999); *DeCaminada v. Coopers & Lybrand, L.L.P.*, 232 Mich.App. 492, 591 N.W.2d 364, 368 (App.1998); *but see Hooters of Am., Inc. v. Phillips*, 39 F.Supp.2d 582, 612 (D.S.C.1998); *Hoffman v. Aaron Kamhi, Inc.*, 927 F.Supp. 640, 645 (S.D.N.Y.1996). Moreover, *Lai's* "knowing waiver" standard is inconsistent with the United States Supreme Court's decisions in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991), and

Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 121 S.Ct. 1302, 149 L.Ed.2d 234(2001). In *Gilmer*, a suit under the Age Discrimination in Employment Act, the Court noted that under the FAA, arbitration agreements are "valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." *Gilmer*, 500 U.S. at 24-25, 111 S.Ct. 1647. The Court concluded that such statutory causes of action may be the subject of an arbitration agreement. *Id.* at 26, 111 S.Ct. 1647. In *Circuit City*, an employer brought an action in federal court under the FAA seeking to enjoin a suit in state court under a California employment discrimination statute, because the employee had agreed to arbitration. *Circuit City*, 532 U.S. at 110, 121 S.Ct. 1302. The employee argued that the FAA does not apply to contracts of employment. *Id.* at 113, 121 S.Ct. 1302. The Court stated that it "had been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context," and held for the employer. *Id.* at 123, 121 S.Ct. 1302. Requiring *Lai's* heightened standard would undermine these principles by allowing an arbitration agreement covering statutory claims to be declared unenforceable on some basis other than one required at law or in equity for contract revocation.

Myers also urges this Court to require a heightened standard because a Federal Equal Employment Opportunity Commission policy disfavors compulsory arbitration of discrimination claims. Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes, EEOC Notice No. 915.00 (July 10, 1997). While we may give some deference to the statutory interpretation of the

government agency charged with implementing that statute, that cannot trump our deference to a United States Supreme Court decision. *See In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480, 490-91 (Tex.2001).

Finally, Myers argues that this provision should not be enforced because it is unconscionable. Unconscionability includes two aspects: (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision, and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself. *See Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 498-99 (Tex.1991) (Gonzalez, J., concurring). In *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 n. 3 (Tex.1999), we observed in dicta that substantive unconscionability of an arbitration clause cannot be asserted to the court as a reason not to compel arbitration, and that such a claim must instead be "submitted to the designated arbitrator."[3]

This proposition first appeared in Texas jurisprudence in *In re Foster Mold, Inc.*, 979 S.W.2d 665, 667 (Tex.App.-El Paso 1998) (orig. proceeding). That case relied on the United States Supreme Court's decision in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 403-04, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), and on two cases

3. Several courts of appeals have relied on this language in examining arbitration provisions. *See In re Rangel*, 45 S.W.3d 783, 786 (Tex.App.-Waco 2001, orig. proceeding); *Smith v. H.E. Butt Grocery Co.*, 18 S.W.3d 910, 912 (Tex.App.-Beaumont 2000, pet. denied); *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 367 (Tex.App.-Houston [14th Dist.] 2000, orig. proceeding).

from the Fifth Circuit Court of Appeals: *Miller v. Public Storage Management, Inc.*, 121 F.3d 215 (5th Cir.1997), and *R.M. Perez & Associates, Inc. v. Welch*, 960 F.2d 534 (5th Cir.1992).

In *Prima Paint Corp.*, the Supreme Court held that under section 4 of the FAA, "if the claim is fraud in the inducement of the arbitration clause itself ... the federal court may proceed to adjudicate it," but "the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally." *Prima Paint Corp.*, 388 U.S. at 403-04, 87 S.Ct. 1801. The Fifth Circuit cases have similar language. *See Miller*, 121 F.3d at 218-19; *R.M. Perez*, 960 F.2d at 538-39. Neither *Miller* nor *R.M. Perez* addressed the distinction between procedural and substantive unconscionability of an arbitration clause. They each noted that courts may consider claims relating to the arbitration clause itself but not regarding the contract as a whole. These cases simply do not support *Foster Mold's* conclusion that a court may not address claims that the arbitration clause is substantively unconscionable.

Several federal courts have examined substantive unconscionability of an arbitration clause when ruling on a motion to compel. *See, e.g., Dobbins v. Hawk's Enters.*, 198 F.3d 715, 717 (8th Cir.1999); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181-84 (3rd.Cir.1999); *We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838, 843 (7th Cir.1999); *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2nd Cir.1998); *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 733 (4th Cir.1991). These cases seem to us clearly correct. *See also In re Conseco Fin. Servicing Corp.*, 19 S.W.3d 562,

568 n. 3 (Tex.App.-Waco 2000, orig. proceeding) (questioning the validity of the dicta in *Oakwood Homes*). We therefore clarify that courts may consider both procedural and substantive unconscionability of an arbitration clause in evaluating the validity of an arbitration provision.

Myers first asserts that the provision is procedurally unconscionable as there was gross disparity in bargaining power between the parties because Myers had no opportunity to negotiate; Halliburton told him to accept the Program or leave. But in *Hathaway*, we recognized that an employer may make precisely such a "take it or leave it" offer to its at-will employees. *Hathaway*, 711 S.W.2d at 228-29. Because an employer has a general right under Texas law to discharge an at-will employee, it cannot be unconscionable, without more, merely to premise continued employment on acceptance of new or additional employment terms. *See also Smith v. H.E. Butt Grocery Co.*, 18 S.W.3d 910, 912 (Tex.App.-Beaumont 2000, pet. denied) (rejecting the argument that an arbitration provision is unconscionable merely because the parties did not negotiate its terms).

Myers also argues that the arbitration plan is so unfair to employees that the Program is substantively unconscionable. But Myers has failed to make such a showing here. The Program has several terms that provide protection to the employee in the process. For example, the company agreed to pay all the expenses of an arbitration except a $50 filing fee. Both parties are to participate in the selection of the neutral arbitrator. The Program provides up to $2,500 for an employee to consult with an attorney. The rules provide for pre-arbitration discovery under the Federal Rules of Civil

Procedure. All remedies the employee could have pursued in the court system are available in the arbitration. And the arbitrator may award reasonable attorney's fees to an employee who receives a favorable award regardless of whether such an award would be available in court. On this record, we conclude that Myers has failed to carry his burden to show that the Program is unconscionable.

Several courts have found arbitration provisions with similar terms to be enforceable. *See Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C.Cir.1997) (arbitration agreement valid which (1) required a neutral arbitrator, (2) allowed more than minimal discovery, (3) resulted in a written award, (4) allowed all remedies that would be available in court, and (5) did not require the employee to pay either unreasonable costs or any arbitrator's fees or expenses); *Beauchamp v. Great West Life Assurance Co.*, 918 F.Supp. 1091, 1098 (E.D.Mich.1996) (an agreement to arbitrate is not substantively unconscionable because the employee did not waive any substantive rights, the employee simply agreed to have those rights determined in a different forum); *Rembert v. Ryan's Family Steak Houses, Inc.*, 235 Mich.App. 118, 596 N.W.2d 208, 226 (App.1999) (an arbitration agreement covering statutory claims is valid so long as "the arbitration agreement does not waive the substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights").

Appendix A

III

We conclude that Myers clearly had notice of the proposed changes to his at-will employment contract and accepted them by continuing to work after January 1, 1998. We also conclude that Myers has failed to show that the arbitration provision is unconscionable. Because the arbitration provision is otherwise enforceable under general contract principles, a valid arbitration provision exists between Myers and Halliburton, and the trial court should have granted Halliburton's motion to compel arbitration. Mandamus relief is appropriate because Halliburton has no adequate remedy by appeal. *See Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 271 (Tex.1992). Accordingly, we conditionally grant the petition for writ of mandamus. The writ will issue only if the trial court fails to act promptly.

Justice BAKER concurred in the Court's judgment only.

APPENDIX B — OPINION OF THE FOURTEENTH COURT OF APPEALS OF TEXAS DATED OCTOBER 26, 2000

THE STATE OF TEXAS
In The
FOURTEENTH COURT OF APPEALS

NO. 14-00-00464-CV

In re HALLIBURTON COMPANY and
BROWN & ROOT ENERGY SERVICES, INC., Relators

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

OPINION

In this original proceeding, relators, Halliburton Company and Brown & Root Energy Services, Inc. (collectively, "Brown & Root"), seek a writ of mandamus directing the trial court to: (i) vacate an order denying arbitration and (ii) order arbitration. We deny the writ.

Real party in interest, James D. Meyers, filed suit against Brown & Root alleging unlawful employment discrimination. Brown & Root filed a motion to compel arbitration of the dispute pursuant to its employee dispute resolution plan (the "plan"). The trial court denied this motion.

Brown & Root challenges the denial of this motion on the grounds that: (1) the parties entered into an enforceable agreement to arbitrate all employment disputes; (2) the arbitration agreement was subject to the Federal Arbitration Act (the "Act") because the employment relationship involved

interstate commerce;[1] and (3) a denial of arbitration required by the Act is subject to mandamus relief.[2] Because Myers does not dispute Brown & Root's second and third contentions, we need only address the first, namely, whether the plan constituted an enforceable agreement to arbitrate. However, because our denial of mandamus relief is dictated by our conclusion, discussed below, that Brown & Root's petition does not demonstrate that the agreement to arbitrate was supported by valid consideration in the form of non-illusory promises, as Brown & Root contends, we need not address the remaining issues concerning the enforceability of the agreement.[3]

---

1. *See In re L&L Kempwood Assocs.*, 9 S.W.3d 125, 127 (Tex. 1999) (noting that the provision of the Act that makes enforceable a written arbitration provision in "a contract evidencing a transaction involving commerce" extends to any contract affecting commerce, as far as the Commerce Clause of the United States Constitution will reach) (citing *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 273-77 (1995)).

2. *See Kempwood*, 9 S.W.3d at 128 ("A party denied right to arbitrate under the Federal Arbitration Act by a state court has no adequate remedy by appeal and is entitled to mandamus relief to correct a clear abuse of discretion.").

3. The parties also dispute: (a) whether the alleged agreement to arbitrate was supported by valid consideration in the form of a bargained-for exchange, and whether, under the pre-existing duty rule, Myers became obligated to do only what he was already bound to do; (b) whether Myers assented to the plan; (c) whether the plan handbook itself constituted a binding contract despite that it could be unilaterally amended or withdrawn; (d) whether a written agreement to arbitrate was signed, or was required to be signed, by Myers; and (e) whether the alleged arbitration agreement was unconscionable due to the disparity in bargaining power of the parties.

Appendix B

It is undisputed in this case that Myers was an at-will employee. At-will employment does not preclude the formation of a contract between the employer and employee so long as it does not limit the ability of either to terminate the employment at will (and thereby do away with the at-will nature of the relationship). *See Light v. Centel Cellular Co.*, 883 S.W.2d 642, 644 (Tex. 1994).

To determine whether parties have entered into an agreement to arbitrate, we apply ordinary state law principles regarding formation of contracts. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under those principles, two essential elements to the formation of a contract are a meeting of the minds, *i.e.*, an offer and acceptance, and consideration.[4] *See Hathaway v. General Mills, Inc.*, 711 S.W.2d 227, 228 (Tex. 1986).

The manner in which a meeting of the minds and consideration come about depend on whether a contract is "bilateral" or "unilateral." In a bilateral contract, the parties exchange promises to perform whereas in a "unilateral" contract, one party's promise to perform is exchanged for the other party's act of performance. *See* BLACK'S LAW DICTIONARY 148 (5th ed. 1979).

A promise or obligation which is left within the promisor's discretion to perform, not perform, or terminate at will is considered illusory and will not support a bilateral contract.

4. Consideration is defined as either a benefit to the promisor or a loss or detriment to the promisee. *See N. Natural Gas Co. v. Conoco, Inc.*, 986 S.W.2d 603, 607 (Tex. 1998).

See Light, 883 S.W.2d at 644-45. Accordingly, because an at-will employer and employee may not contract to limit the ability of either to terminate the employment at-will, a promise by either which is dependent on a period of continued employment is illusory and thus insufficient to support a bilateral contract because it would fail to bind the promisor who always retains the option of discontinuing employment in lieu of performance. *See id.*

By contrast, a *unilateral* contract can be dependent upon continued at-will employment. *See Light*, 883 S.W.2d at 645 n.6.[5] Moreover, either party to an employment at-will may impose modifications to the employment terms as a condition of continued employment. *See Hathaway*, 711 S.W.2d at 229. Thus, if an employer notifies an at-will employee of changes in employment terms, the employee must accept the new terms or quit. *See id.* If the employee continues working after being unequivocally notified of the changes, he has accepted the changes as a matter of law. *See id.*

In this case, to establish a meeting of the minds, Brown & Root contends that Myers accepted the arbitration agreement by continuing to work after Brown & Root gave him

5. Thus, for example, an employer's promise of compensation to an at-will employee cannot create an enforceable bilateral contract at the time it is made because the employer remains free to then fire the at-will employee and avoid the obligation; but such an offer can result in an enforceable unilateral contract if the employee thereafter performs the work because that performance then obligates the employer to perform his promise of compensation. *See Light*, 883 S.W.2d at 645 nn.5-6.

notice of it, *i.e.*, a unilateral agreement.[6] Yet, to establish consideration for the arbitration agreement, Brown & Root relies exclusively on what it asserts was an exchange of non-illusory promises, *i.e.*, a bilateral agreement. However, it cannot be both ways; if an enforceable agreement to arbitrate was created, it had to be either bilateral or unilateral.

At the time the plan (containing the arbitration agreement) was put into effect, an employee had the option either to continue working subject to it or to cease his employment. An employee who then elected to cease his employment would not have accepted, or been bound by, the arbitration agreement. Because the agreement could therefore be accepted only by continued employment, it was dependent upon continued employment and was thus illusory for an at-will employee such as Myers. Brown & Root's mandamus petition thus fails to establish its contention that the arbitration agreement was supported by consideration in the form of non-illusory promises. Because the petition does not therefore demonstrate that the trial court abused its discretion by denying the motion to compel arbitration, it is denied.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed October 26, 2000.
Panel consists of Justices Fowler, Edelman, and Baird.[7]
Do not publish — Tex. R. App. P. 47.3(b).

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6. Brown & Root does not contend that Myers agreed to the plan in any manner other than by continuing to work after it went into effect.

7. Former Judge Charles F. Baird sitting by assignment.

APPENDIX C — LETTER FROM THE SUPREME COURT OF TEXAS DENYING MOTION FOR REHEARING DATED AUGUST 22, 2002

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

August 22, 2002

Mr. Russell J. Weintraub
727 East Dean Keeton Street
Austin, TX 78705

Mr. W. Carl Jordan
Vinson & Elkins
1001 Fannin, Suite 2300
Houston, TX 77002-6760

Ms. Barbara J. Gardner
Barbara Gardner & Associates
3212 Smith Street, Suite 208
Houston, TX 77006

RE: Case Number: 00-1206
Court of Appeals Number: 14-00-00464-CV
Trial Court Number: 99-50301

Style: IN RE HALLIBURTON COMPANY AND BROWN & ROOT ENERGY SERVICES

Appendix C

Dear Counsel:

Today the Supreme Court of Texas denied the motion for rehearing in the above referenced cause.

Sincerely,

Andrew Weber, Clerk

by s/ Patricia A. Cook
Patricia A. Cook
Chief Deputy Clerk

cc: Mr. Ed Wells, Clerk
Mr. Charles Bacarisse, Clerk
Honorable Martha Hill Jamison
Honorable Louis M. Moore

APPENDIX D — AFFIDAVIT OF J.D. MYERS DATED MARCH 7, 2000

AFFIDAVIT OF J.D. MYERS

STATE OF TEXAS)
)
COUNTY OF HARRIS)

I, J.D. Myers, am more than twenty-one (21) years of age, and I am competent to make this affidavit. The facts stated below are true and correct, and they are based on my personal knowledge.

I graduated from Aldine High School in 1963. I did not go to college. I have worked for Brown & Root for thirty-two (32) years. I began working there in 1968 when I was twenty-four (24) years old, and I work there today in the same pipe yard. I had only one other job before I came to work for Brown & Root. In 1968, I started as a welder, and through the years I was promoted to lead welder, to welding foreman, and finally to general welding foreman. My work has been basically the same type of work over the years, except that I was promoted to higher levels of authority and responsibility. I have never had an employment contract.

I have reviewed the form attached to the Defendant's Motion to Compel Arbitration labeled Exhibit E. The form is entitled "Assignment Authority Supplement," dated June 19, 1996. I did not sign that form. Someone else signed my name to that form. I have no doubt about this. The handwriting is different, especially in "Myers." I ask the Court to compare my signature below with the one on the form in defendant's Exhibit E.

Appendix D

This particular form, "Assignment Authority Supplement," was never discussed with me by anyone with Brown & Root. The first time that I ever saw this particular form was when my attorney sent me a copy. Also, had I just read this form without the assistance of an attorney, I would not have understood what it means.

I recall receiving the handbooks and materials explaining the company's "Dispute Resolution Program." I looked through them at the time, but I did not study the wording. There is nothing in those materials stating that I had to give up my constitutional right to a trial by a jury of my peers. No one ever told me, or even mentioned, that I was giving up any constitutional right. I think that I would have remembered it if someone had told me that I was giving up a right guaranteed to my by the United States Constitution. I did not seek legal advice at the time. The booklets were just more paper that the company hands out to employees.

No one ever told me or indicated that this handbook or these papers were a binding contract of any kind. I never viewed them as a binding contract. No one ever said anything, to the effect, if you keep working here that it would be treated as a binding employment contract.

I never did anything differently in my work at the time these materials were distributed or afterwards. I was never asked or instructed by any supervisor to do anything differently regarding the information in these booklets. My employment continued just the same as it always had, and nothing was different.

Appendix D

My experience with Brown & Root is that the company tells me what to do, and I do it. There has never been any bargaining or negotiating over any company policies. Definitely, there was no negotiation regarding the Dispute Resolution Program. Furthermore, I am not on the same level as Brown & Root in the sense of negotiating any employment terms, not even close. The company is very sophisticated, with its own lawyers and its own personnel managers. I am just one of many, many workers. The company took advantage of me and others about how it intended to use this Dispute Resolution Program, which is to deny us our constitutional right to a trial by jury.

s/ J.D. Myers
J.D. Myers

BEFORE ME on the 7th day of March, 2000, appeared J.D. Myers, whose name appears above, and confirmed that the statements made in this affidavit are accurate and are based on his personal knowledge.

s/ Belinda Garza Gaddis
Notary Public for the County of Harris